The Court of Common Pleas of Dauphin County in its decision at No. 61 Commonwealth Docket, 1933, allowed no deduction for the Federal securities owned and a proportionate deduction for shares of stock of Pennsylvania corporations paying a capital stock tax or tax on shares. This decision was affirmed by the Supreme Court of Pennsylvania.

On an appeal to the Supreme Court of the United States, this court upheld the Schuylkill Trust Company's contention that the failure to deduct the Federal securities and the allowance of the deduction of Pennsylvania shares was a discrimination against such securities and in its opinion held that the amendments of July 11, 1923, P. L. 1071, and May 7, 1927, P. L. 853, to the Act of June 13, 1907, P. L. 640, allowed a deduction for shares of stock of Pennsylvania corporations liable to pay to the Commonwealth a capital stock tax or relieved from the payment of capital stock tax or tax on shares, were discriminatory, and reversed the decision of the Supreme Court of Pennsylvania and remitted the cause for further proceedings.

In an argument before the Court of Common Pleas of Dauphin County on remittitur from the Supreme Court of Pennsylvania to that court, the Schuylkill Trust Company contended that as a result of the decision of the Supreme Court of the United States, it was subject to no tax for the year 1930.

The Commonwealth contended, in construing the decision of the Supreme Court of the United States that these amendments having been claimed to be discrim-

inatory and therefore unconstitutional, the Schuylkill Trust Company was subject to tax for the year in question in pursuance to the Act of June 13, 1907, and that in ascertaining the value of its shares, no deductions should be made from the value of its shares.

The Court of Common Pleas of Dauphin County in an opinion rendered by William M. Hargest, P. J., decided that to remove the discrimination, a proportionate deduction should be made of Federal securities and its final judgment was entered in accordance with this opinion.

This judgment was affirmed by the Supreme Court of Pennsylvania (R. 187).

The Supreme Court of the United States, in upholding the contention of the Schuylkill Trust Company, as to the question of discrimination, said:

> **We think that the issue of discrimination is not to be resolved by a choice between the two contentions as to the nature of the tax. The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders.** The State has exempted certain assets on the theory that to measure the tax in part by their value would in effect be to tax them twice. If to measure the shareholder's tax by inclusion of these taxed or exempted securities found amongst the company's assets would be to tax the shareholder in virtue of the company's ownership of those securities, it seems clear that to refuse to exempt United States securities from the measure of the tax is to lay a tax reckoned

upon their value. To put it otherwise, if to exclude securities already taxed or exempted from tax pursuant to the policy of the Commonwealth avoids double taxation, to include United States securities in the measure of the tax seems inevitably to increase the burden of the tax by reason of their ownership. If the burden of the tax be lifted in respect of some securities (as it is by confession from those issued by certain Pennsylvania corporations) it must necessarily fall on the remaining securities owned by the company. If the tax is lifted from the shares of certain trust companies because those companies own only stocks already taxed or relieved from taxation by the State, and shares in other trust companies are taxed amongst whose assets there are United States bonds or other securities entitled to exemption because issued by federal instrumentalities which are figured in the base of the tax, it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely by reason of ownership of such federal securities. (Boldface ours)

The mandate issued by the Supreme Court of the United States to the Supreme Court of Pennsylvania was "The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In view of this decision, the Commonwealth contends that the amendments of 1923, 1927 and 1929, having been declared discriminatory and therefore unconstitutional and void, these amendments are a nullity and of no effect, and we therefore must revert to the Act of June 13, 1907, P. L. 640 in assessing the tax on

the Schuylkill Trust Company. Of this act, this court said:

> **The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal government.** (Boldface ours)

II

Where an act purporting to amend and reenact an existing statute is void, the original statute remains in force; even though the amending act contains a repealing clause. The repealing clause itself falling with the void amending act.

This principle has been universally sustained by state supreme courts and the Supreme Court of the United States.

MAZUREK *v.* FARMERS' MUTUAL FIRE INSURANCE COMPANY OF JAMESTOWN, Appellant, 320 Pa. 33, at page 37 (1935):

> Where a subsequent statute which would, if valid, act as a repeal of a prior statute only by implication, i. e., because its terms are contradictory of the provisions of the earlier enactment, is itself unconstitutional, it must be obvious that the earlier act remains in full force and effect. This follows inevitably from the fact that in the eyes of the law it never came into existence. Never having come into existence, it could have no effect. The

rule that an unconstitutional enactment will not by mere implication repeal a preexistent valid law is well established: Frost *v.* Corporation Commission, 278 U. S. 515; The People *v.* Mensching, 187 N. Y. 8, and cases there cited. **Nor does the fact that the later invalid statute contains a clause repealing all prior inconsistent legislation work a change in the result:** State *v.* Blend, 121 Ind. 514; Sullivan *v.* Adams, 69 Mass. 476; Campau *v.* City of Detroit, 14 Mich. 276; City of Detroit *v.* Western Union Tel. Co., 130 Mich. 474; State *v.* Luscher, 157 Minn. 192; Devoy *v.* The Mayor, 36 N. Y. 449; Allen *v.* Raleigh, 181 N. C. 453. The only question is whether where, as here, an act expressly repeals another act and provides a substitute for the act repealed and the substitute is found unconstitutional, is the other act so expressly repealed to be judicially accepted as repealed. **Such a construction is not warranted unless it clearly appears that the legislature would have passed the repealing clauses even if it had not provided a substitute for the acts repealed.** Not only was there no such intention on the part of the legislature in the present case, but it is apparent that exactly the opposite was intended. The precise question now being discussed has not heretofore been passed upon by this court. However, other courts have enunciated the principle that a repealing clause expressly repealing a prior statute is itself ineffective where the substitute for the prior statute provided in the repealing statute is unconstitutional, and where it does not appear that the legislature would have enacted the repealing clause without providing a substitute for the act repealed: Rosenfield *v.* Drake, 112 Pa. Superior Ct. 1, 170 A. 414; People *v.* Fox, 294 Ill. 263; State *v.* Joyce, 307 Mo. 49; State *v.* Rice, 115 Md. 317; People *v.* De Blaay, 137 Mich. 402; Williams *v.* The State, 81 N. H. 341; State *v.* Edmondson, 89 Ohio State 351; State *v.* Groom, 91 Ohio State 1;

Portland *v.* Coffey, 61 Oregon 507. There is no doubt that the legislature in enacting section 344 of the Act of 1921 intended to preserve to courts of counties in which insured properties were located the jurisdiction in insurance cases created by the Act of 1857. It is a legitimate inference that the Act of 1857 would not have been repealed by the Act of 1921 if the legislature had known that section 344 of that act would be declared invalid for defect in the title of the act. (Boldface ours)

ROSENFIELD *v.* DRAKE et al., Appellants, 112 Superior Court, 1, at page 6 (1934):

* * * **"Unless it employs language showing an intent to repeal in any event and irrespective of its unconstitutional provision, an act which is invalid or unconstitutional and void or inoperative does not repeal another valid act."**

The whole statute, including the repealing section, is, in our judgment, void. The appellee comes, therefore, within the provision of the Act of 1919, supra, which remains unrepealed, fixing definite salaries for district attorneys in counties having a population of less than one million. We might add that the Act of June 9, 1931, P. L. 401, 412, §256, fixes definite salaries for district attorneys in counties of the third and fourth classes. Under the provisions of the former act, the salary of the district attorneys in counties whose population is more than forty and does not exceed fifty thousand (which applies to Bradford County) shall be $1,250—the amount fixed by the learned court below. (Boldface ours)

COMMONWEALTH *v.* MCDERMOTT, 10 D. & C. 618 at page 623 (1928):

> In the present case the act was aimed against those organizations, individuals and groups of individuals who do not come within the exemptions, and it is in the application of the act to them that the discrimination heretofore discussed results. **If this discrimination results in arbitrarily denying to one citizen or group of citizens rights which are given to another, the whole act is necessarily void.** (Boldface ours)

COMMONWEALTH ex rel. *v.* HUMPHREY et al. 288 Pa. 280 at page 289 (1927):

> * * * We cannot presume that the legislature would have passed the present act without the exemption contained in paragraph (g) of section 24, any more than we are warranted in thinking it would have passed the act even though all the numerous exemptions inserted had been omitted; hence, we must assume these exemptions to be inseparable expressions of the legislative will, and, as one, at least, of them is unconstitutional, the whole act falls.

BOOTH & FLINN *v.* MILLER, 237 Pa. 297 at page 309 (1912)

COMMONWEALTH *v.* ALDERMAN, 275 Pa. 483 at page 486 (1923)

This principle is very concisely stated by the Supreme Court of the United States in FROST *v.* CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, 278 U. S. 515 at page 525 (1929):

> **Here it is conceded that the statute before the amendment, was entirely valid. When passed, it**

expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in the existing statute, that statute must stand as the only valid expression of the legislative intent.

In passing upon a similar situation, the supreme court of Michigan, speaking through Judge Cooley, in Campau *v.* Detroit, 14 Mich. 276, 286, said: "But nothing can come in conflict with a nullity, and nothing is therefore repealed by this act on the ground solely of its being inconsistent with a section of this law which is entirely unconstitutional and void." In Carr *v.* State, 127 Ind. 204, 215, 11 L. R. A. 370, 22 Am. St. Rep. 624, 26 N. E. 778, the state supreme court disposed of the same point in these words: "We suppose it clear that no law can be changed or repealed by a subsequent act which is void because unconstitutional * * * An act which violates the Constitution has no power, and can, of course, neither build up nor tear down. It can neither create new rights nor destroy existing ones. It is an empty legislative declaration without force or vitality." * * * (Boldface ours)

DAVIS *v.* WALLACE, 257 U. S. page 477 at page 483 (1922)

In TRUAX *v.* CORRIGAN, 257 U. S. 312, at page 341 (1921) the Arizona law was amended to take away certain equitable rights of injunction then existing. The Supreme Court of the United States having de-

cided that this amendment was invalid because it was a denial of the equal protection of the laws said:

> * * * Thus, Par. 1464 was an amendment to Par. 1456, and was included with the original section in the Code revision of 1913. To invalidate Par. 1456, we must assume that, had the legislature known that the clauses of Par. 1464, here involved, construed as the Arizona supreme court has construed them, were unconstitutional, it would have repealed all the existing law conferring the equitable power of injunction on its first-instance courts of general jurisdiction. We cannot make this assumption. The exception introduced by amendment to Par. 1456 proving invalid, the original law stands without the amendatory exception.

The Supreme Court of North Carolina in ALLEN *v.* CITY OF RALEIGH, 107 S. E. Rep. 463 at page 465 (1921) said:

> Where a repeal of a prior law is inserted in an act in order to secure the unobstructed operation of the act and the repealing law is itself held to be void, the provision for the repeal of the prior law will fall with it, and will not be operative in the repeal of the prior law unless the language of the repealing clause is such as to leave no doubt as to its intention to repeal the former law in any event. Where, however, it is not clear that the Legislature by a repealing clause attached to an unconstitutional act intended to repeal a former statute upon the same subject, except on the supposition that the new act would take the place of the former one, the repealing clause falls with the act of which it is a part.

In WILKINSON *v.* BOARD OF CHILDREN'S GUARDIANS OF MARION COUNTY, 62 N. E. 481 (1902) the court said:

> * * * if the amendatory act was unconstitutional, it was void, and had no effect on the original legislation.

In NORTON *v.* SHELBY COUNTY, 118 U. S. 425, at 442, the Supreme Court said:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

FARRINGTON *v.* MENSCHING, 79 N. E. 884, 187 N. Y. 8. LEWIS SUTHERLAND STATUTORY CONSTRUCTION, page 457, Sec. 245.

LEWIS SUTHERLAND, STATUTORY CONSTRUCTION, page 493, Sec. 256.

The Supreme Court of the United States, in the Schuylkill Trust Company case, having determined the amendments of 1923, 1927 and 1929 to the act of 1907 to be discriminatory and therefore unconstitutional, they are a nullity and certainly can have no effect on the prior valid act of 1907.

This principle was clearly pointed out by Mr. Justice Cardozo in the strong dissenting opinion in the Schuylkill Trust Company case, when he said:

> **The Acts of 1923, 1927 and 1929 prescribing the deductions, were amendatory statutes, separable, even though invalid, from the acts thereby**

> **amended. Eberle v. Michigan, 232 U. S. 700, 705; Davis v. Wallace, 257 U. S. 478, 484, 485; Truax v. Corrigan, 257 U. S. 312, 342.** (Boldface ours)

A valid act cannot be impaired or affected by an unconstitutional amendment. The amendment may be held invalid, but the act it amends, if free from constitutional objections, will stand as it did before the unconstitutional amendment. It cannot for a moment be entertained that an unconstitutional amendment to a valid act can destroy the validity of the act.

The amendatory act is void from its inception and may be entirely discarded as unaffecting the original act. To this effect, see GAY *v.* BRENT, 179 S. W. 1051, 1058, 166 Ky. 833.

The Act of 1907, P. L. 640, in addition to the amendments thereto, was squarely before the Supreme Court of the United States, for this court, in clear, unequivocal language, in discussing that act said:

> **The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal government.** * (Boldface ours)

The Act of June 13, 1907, P. L. 640 contained the following proviso:

> * * * And provided further, That in case any such company shall collect annually from the

*Van Allen *v.* Nolan, 3 Wall. 573; Cleveland Trust Company *v.* Lander, 184 U. S. 111; Des Moines National Bank *v.* Fairweather, 263 U. S. 103. (Cited by the Supreme Court of the United States)

shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth.

This proviso does not authorize the Auditor General to assess the tax. The main portion of the act imposes a duty upon the Auditor General to assess the shares for taxation. In no other section of the act is such a duty imposed upon the Auditor General. In imposing a tax upon the actual value of the shares, the Auditor General is to add the capital stock paid in, the surplus and undivided profits and dividing this by the number of shares to assess the tax.

The proviso is merely an inducement to the trust company in the form of a discount to pay the tax on or before a certain date. If the trust company elects to pay the tax in accordance with the proviso, the duty is upon the officers of the trust company to compute the tax against themselves in accordance with the provisions of the proviso and pay the same into the State Treasury.

This provision in the act of 1907 is not unlike the provisions in many taxing statutes of this Commonwealth which offer discounts to the taxable if the tax is paid at a certain time. If the proviso in this act did not have to do merely with a discount, why was it necessary to amend the act of 1907 so as to authorize the Auditor General to make the tax assessment against the shareholders according to the discount method as provided in the act of 1907? As further proof of the fact that the discount method of payment was not the method by which the Auditor General was to assess the tax under the act of 1907, we refer to the case of COMMONWEALTH *v.* MORTGAGE TRUST COMPANY, 227 Pa. 163 (1910) in which case, this in passing on the constitutionality of this act, directed its entire discussion to the fixing of the value of shares by adding the capital stock, surplus and undivided profits and making no mention of the discount method in the proviso.

The Supreme Court of the United States in the SCHUYLKILL TRUST COMPANY case had before it the entire act of 1907 and held that it did not discriminate against United States securities.

The court, in its opinion, said "On June 13, 1907, the General Assembly adopted an act prescribing another method of taxation in the case of trust companies. Its pertinent provisions are copied in the margin."

The provisions referred to in the margin deal with the assessment of the tax on the capital stock, surplus and undivided profits.

Even for the sake of argument, if the proviso likewise falls as being discriminatory, the main part of the act of 1907 stands intact because that proviso could be severed from the act of 1907 without harm to the act because it is not interwoven with the forepart of the act and the forepart of the act does not depend upon the proviso. Furthermore, it is the Commonwealth's position that the proviso of the act of 1907 is not applicable in the instant case, nor in the case of any trust company for the tax year 1930 because the Girard Trust Company did not pay its tax on shares in accordance with the proviso, i. e., on or before March first of the year in question.

An examination of the act of 1907 clearly shows that without the proviso, it is complete in its provisions and purpose and sufficient to carry out the intent of the legislature. The act, without the proviso, provides for the filing of reports, the assessment of the tax and the collection thereof. It provides for the filing of reports on or before the twentieth day of June, in each and every year with the Auditor General, and upon the assessment of said tax on reports filed, the company was required to pay said amount within forty days of said settlement. The proviso permitted title insurance or trust companies certain deductions if the tax were paid on or before the first day of March in each year. What else could have been the intention of the legislature in the proviso contained in the act of 1907 other than to offer to these banks these deductions as a discount if the tax were paid in March rather than in June of the tax year.

The Act of 1907, with section 710 and section 807 of The Fiscal Code (Act of April 9, 1929) now provides and in 1930 provided the necessary machinery for the assessment and collection of the tax on shares on title insurance and trust companies. There is no merit in appellant's argument or the position taken by the lower court that since the act of 1907 contained a proviso allowing the deductions held to be discriminatory in the amendments of 1923 and 1927, the act of 1907 is void. Nor is there merit in the argument in the lower court that the proviso carry out a legislative policy, that is to avoid double taxation, for if the policy of the legislature was to avoid double taxation, why was the tax not so imposed in the body of the act rather than by proviso so that all title insurance and trust companies might benefit by the legislative policy rather than those who assessed and paid the tax themselves on March first of each year. It was not until 1923 that the legislative policy to avoid double taxation was invoked and the discount method contained in the proviso of the act of 1907 was made the method of taxation in 1923. And it was not until 1927, to continue this legislative policy with respect to corporations relieved from the payment of capital stock tax that this additional exemption was allowed. It would seem that this would clearly indicate that the proviso was nothing more than an incentive in the form of a discount to these title insurance and trust companies to pay their tax in March rather than in June to enable the Commonwealth to have the benefit of this revenue at an earlier period. Corpus Juris 59, Statutes, Section 206.

b. *Determination of Severability of Statute:* Whether the valid and invalid parts of a statute

> are independent and separable, or interdependent, is a question of construction and of legislative intent, and in determining the question the rule is that if, when the invalid part is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained to that extent; and this rule is especially applicable where the statute provides for two distinct subjects. In this connection it has frequently been declared that the valid part of a statute will be sustained where the valid and invalid parts are so separate and distinct that it is clear or may be presumed that the legislature would have enacted the former without the latter, if it had known of the invalidity, or, as otherwise stated, if the valid or invalid parts are not so intimately connected as to raise the presumption that the legislature would not have enacted the one without the other, the act will be upheld so far as valid. * * *

The act of 1907 is a revenue raising statute and its primary object is to raise revenue. The proviso contained in the act was merely an inducement to the banks to pay the tax themselves before a certain date. It seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect to the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the proviso shall fall for lack of validity.

In the case of COMMONWEALTH ex rel. *v.* HUMPHREY et al., supra, the court said:

> * * * This rule is expressed in Rothermel *v.* Meyerle, 136 Pa. 250, 265, as follows: "If the part which is unconstitutional in its operation is independent of, and readily separable from, that

> which is constitutional, so the latter may stand by itself, as the reasonable and proper expression of the legislative will, it may be sustained as such; * * *"

The unconstitutionality of one provision of a statute does not render it invalid as a whole, where such provision may be stricken out without altering the meaning, purpose, or effect of those remaining. See MACMILLIAN Co. *v.* JOHNSON, 269 F. 28.

Unconstitutionality of a part of a statute does not render the balance invalid, where enough remains to show the legislative intent and to furnish sufficient details. See STATE *v.* DUNCAN, 175 S. W. 940, 265 Mo. 26.

Where an unconstitutional provision of a statute stands by itself and is so separated from the rest of the statute in purpose and meaning that it may be eliminated without affecting the validity of the remainder, and it does not depend on the rest of the statute, and the rest of the statute does not depend on it, and they are not so related in substance and object that it is impossible to suppose that the legislature would have passed one without the other, the invalid provision of the statute may be eliminated. See PEOPLE *v.* PURDY, 89 N. E. 844, 196 N. Y. 550; PEOPLE *v.* PURDY, 89 N. E. 838, 196 N. Y. 270.

How can appellant complain that to tax it for the year 1930 allowing no deductions would result in a lack of uniformity since all other title insurance and trust companies taxes for the year 1930 were allowed the deductions. Certainly the Commonwealth in taxing these institutions could not do otherwise since it was following the statute with respect to them.

Appellant raised the questions with respect to these deductions and since these amendments have been declared unconstitutional, how can appellant with any justification now claim that it should be taxed like the other institutions.

All appeals to the Court of Common Pleas of Dauphin County from tax settlements are heard de novo in pursuance to Article IX, Section 1104 of The Fiscal Code (Act of April 9, 1929, P. L. 343). Certainly that court, in rendering its opinion and entering final judgment would be required to do so in accordance with the laws that were in existence and in effect during the tax year in question. This would be so, regardless of how such settlements were made by the fiscal officers of the Commonwealth. If the court's decision was not in accord with the practice of the fiscal officers, it certainly could not be said that the court offended the uniformity clause of the State Constitution. (Article IX, Section 1). If such would be the case, then the courts would be required to follow the policy adopted by the fiscal officers of the Commonwealth regardless of the fact that such fiscal officers followed an illegal policy. Yet the appellant argues that the Court of Common Pleas of Dauphin County cannot tax the appellant in a manner different than other title insurance and trust companies were taxed for the year in question by the fiscal officers of the Commonwealth. By the same token, it would argue that the decision of this court could not effect the appellant for the tax year in question. By inference therefore the appellant contends that a lack of uniformity would be created by the courts, which argument the Commonwealth contends is erroneous.

III

Where the language used in a statute is plain, the court cannot read words into it that are not found therein, either expressly or by fair implication, even to save its constitutionality, because this would be legislation and not construction.

The Commonwealth contends that since the amendments to the act of 1907 have already been declared to be discriminatory and in effect unconstitutional by the Supreme Court of the United States, that it was not within the province of the lower court to remove the discrimination by reading certain words into the acts that were not contained therein. Since the question of the constitutionality of these amendments have already been disposed of, the lower court could not, either expressly or by fair implication, give these amendments a constitutional construction.

The legislature, in 1907, by the Act of June 13, 1907, P. L. 640, specifically taxes trust companies in a certain manner. The measure or base of the tax included United States securities and those securities which were permitted to be deducted by the later amendments. This fact, the legislature knew when this statute was enacted, and it was recently declared to be a valid tax on shares by the decision in the SCHUYLKILL TRUST COMPANY case.

In 1923, the legislature, with this knowledge, specifically and deliberately permitted a deduction of shares of stock of Pennsylvania corporations which had paid a capital stock tax or tax on shares from this tax base.

This was done by the legislature with a specific reason in mind and that to avoid double taxation.

In 1927, the legislature, with the same knowledge, specifically and deliberately permitted an additional deduction by amendment of shares of stock that were relieved from the payment of capital stock tax or tax on shares, and this was done by the legislature with a specific reason in mind, and that, to relieve shares of stock of manufacturing corporations from tax, which manufacturing corporations were relieved, by an act, from the payment of a capital stock tax; and now the appellant would have this court, in effect, write into the amendment the words **"also United States securities"** to remove the discrimination and sustain the constitutionality of these amendments.

If the legislature intended a deduction for United States securities, it could very easily have said so.

The intention of the legislature must primarily be determined from the language employed, and the courts have no right to insert words or phrases so as to incorporate in a statute a new and distinct provision. The courts cannot, by construction, supply a *casus omissus* by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said and which, to all appearances was not in the minds of the legislature at the time of the enactment of the law. No mere omission, no mere failure to provide for contingencies which it may seem wise to have provided for, specifically justify any judicial addition to the language of the statute. It is not for the court to say where the language of the

statute is clear that it shall be so construed as to embrace cases because no good reason can be assigned why they were excluded from its provisions.

The courts have frequently adverted to the fact that if the legislature had intended to accomplish a particular end, it would have been a very simple matter for it to have employed appropriate language to express its intention; "it would," it has sometimes been said "have been easy to say so."

Certainly, if the legislature intended to allow a deduction for United States securities in the taxation of trust companies, which deduction would in effect negative the tax on all trust companies in Pennsylvania, it would have deliberately and specifically provided for such a deduction, for to allow such a deduction would in effect leave the trust companies in such a position that they would be paying hardly any tax whatsoever. It is inconceivable that the legislature ever intended such a thing, especially in view of the fact that these United States securities formed a portion of the base upon which the tax on trust companies was assessed.

We reiterate again that to sustain the constitutionality of the amendments to the act of 1907 by enlarging the deductions so as to permit a deduction of United States securities, this court would be required to write into the act, the qualifying words which would be added to its provisions in order to save it in one aspect and thereby to destroy it in another.

In re LOWRY'S ESTATE, 314 Pa. 518 at page 519 (1934), it was said:

It is the Commonwealth's contention that the legislature by the Act of 1929 intended to make a decedent's interest in an account such as the one now before us, subject to a transfer tax. It may be that the legislature intended to do this but it did not choose apt words with which to effectuate its purpose.

* * * *

* * * The Commonwealth would have us interpret paragraph "e" of section 1 of the amendatory Act of 1929, as though the words "prima facie" in the phrase "shall be deemed, prima facie, a transfer of one-half or other proper fraction thereof" apply only to the words "one-half, or other proper fraction thereof" and not to the word "transfer." Nothing in the act's context or title justifies this interpretation.

* * * *

If our interpretation of paragraph "e" of section 1 of the Act of 1929 makes that paragraph inoperative by putting property held by entireties beyond the reach of the taxing power conferred by the Property Transfer Tax Act of 1919, as amended in 1929, the remedy is obvious. The legislative craftsmen of the United States government and of many states have found no difficulty in framing a law to enable their taxing authorities to include in the appraisal of a decedent's taxable estate the value of the interest in property the decedent held jointly with another, with the right of survivorship. * * *

In the above case, this court refused to make operative, a taxing statute by transposing words that were already in the statute. The appellant asks this court to make operative a statute by interpolating and in-

serting words which are not even in the statute, and this court in the case of CATLIN *v.* PICKETT & Co., Appellants et al., 262 Pa. 351 (1918), specifically refused to add or interpolate words in a statute where it would defeat the intent of the legislature. In construing the Workmen's Compensation Act of June 2, 1915, P. L. 736, Section 307, which provided

> Should any dependent of a deceased employee die, or should the widow or widower remarry, or should the widower become capable of self-support, the right of such dependent, or such widow or widower, to compensation under this section, shall cease. If the compensation payable under this section to any person shall, for any cause, cease, the compensation to the remaining persons entitled thereunder shall thereafter be the same as would have been payable to them had they been the only persons entitled to compensation at the time of the death of the deceased,

this court said:

> The contention of appellant is that the above quoted words "for any cause," are to be limited to the causes stated in the preceding sentences. We do not so construe them. **An additional word or words would have to be interpreted in order to reach that conclusion, and we are not at liberty to add them, unless it is clearly necessary so to do in order to effectuate the legislative intent.** No such necessity exists here. On the contrary we are convinced that the addition of limiting words would defeat that intent. * * * (Boldface ours)

To the same effect is the case of HOWARD *v.* ILLINOIS CENTRAL RAILROAD COMPANY, 207 U. S. 463 at page 501

(1907), in which the Supreme Court of the United States said:

> Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested, that is, by causing the act to read, "any employee when engaged in interstate commerce," we would restrict the act as to the District of Columbia and the territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save, and to save in order to destroy.
>
> The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. **But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose.** * * * (Boldface ours)

See also TRADE-MARK CASES, 100 U. S. 82 at page 95 (1879)

ILLINOIS CENTRAL RAILROAD Co. *v.* MCKENDREE, 203 U. S. 514, at page 529 (1906)

BALLARD *v.* MISSISSIPPI COTTON OIL Co., 34 Southern Rep. 533 at page 554 (1903)

MELLEN LUMBER COMPANY *v.* INDUSTRIAL COMMISSION OF WISCONSIN, 142 N. W. Rep. 187 at page 189 (1913).

In the BALLARD *v.* MISSISSIPPI COTTON OIL COMPANY case, supra, the Supreme Court of Mississippi very tersely stated the test with respect to the severance of statutes saying:

> * * * The difficulty is in finding the true test as to when a statute may be severed. That test clearly is this: That whenever the court finds on the face of a statute a number of different provisions, some constitutional and some unconstitutional, there it may sever, if they be not interdependent, between these provisions, striking out the unconstitutional: and, let it be marked, that in every such case, there is something to sever between on the face of the statute. That is what is meant by the severance of a statute. But wherever a court, in order to uphold the provisions of a statute as constitutional, has to interpolate in such statute provisions not put there by the Legislature, in order, by such interpolation, to make the provision which the Legislature did put there constitutional, there is no case of severance, in any proper legal sense; nor is it, in any legal or logical sense, a proper limitation of the provisions which are in a statute by judicial construction. **Such action by a court is nothing less than judicial legislation pure and simple.** (Boldface ours)

The plain and obvious meaning of the language used in a statute is generally the safest guide to follow in construing it. Seeking hidden meanings at variance with the language used is a perilous undertaking which is quite apt to lead to an amendment of a law by judicial construction as it is to arrive at the actual thought in the legislative mind. These amendments to the act of 1907 primarily say what deduction shall be allowed a trust company in arriving at the value of shares taxable in such trust company. We respect-

fully submit that we cannot see how the lower court was justified in adding thereto, the following words "less United States securities." This, in effect, is what the lower court did in adopting the construction for which the appellant contends. There is nothing doubtful, obscure or ambiguous about the language used. Such action by the lower court is nothing less than judicial legislation.

The lower court in its opinion lays great stress on the presumption that the legislature did not intend to violate the constitution and to support its contention, at great length, cites the actions of our State courts and the Supreme Court of the United States dealing with the construction of various taxing statutes.

The first are the acts imposing a capital stock tax on all of the capital stock of certain corporations. The courts, in the construction of these statutes, rightfully said that these acts must confine the imposition of the tax to so much of the capital stock of corporations as was represented by property and business of the corporation within the State. There is no analogy to be drawn from these cases to the instant case. The decisions in the capital stock tax cases were predicated upon the theory that the legislature, having no inherent power to tax property that was not within the confines of this State could only have intended to tax property within the confines of the State, whereas in the enactment of the act of 1907, the legislature was wholly within its power in passing the act to include all securities of a Pennsylvania trust company and no attempt was made to tax property without the jurisdiction of the Commonwealth. The act of 1907 was a valid exercise of legislative power in the first instance,

whereas in the capital stock tax cases, the original statutes were an exercise of power beyond the legislature.

The second are acts imposing a tax on corporate loans. These acts impose a tax on all money owing and on bonds of corporations and here again the courts have properly limited these acts to the taxation of only those bonds held by residents within this Commonwealth. These acts were also predicated upon the fundamental proposition of a lack of jurisdiction in the legislature, whereas in the enactment of the act of 1907, the legislature was wholly within its right in passing that act to include all securities in the possession of a Pennsylvania trust company.

The third are acts imposing a tax on tonnage carried by various types of transportation companies and here again the courts properly held that this act could apply only to tonnage carried intrastate. This act was predicated upon the fundamental principle that the legislature could not enact laws affecting interstate commerce.

The fourth are acts imposing a tax on gross receipts of various corporations. The courts properly held that the tax on gross receipts must be limited to receipts received in intrastate commerce. Again these laws were predicated upon the fundamental principle that the legislature could not enact laws in contravention of interstate commerce.

The fifth are acts imposing a tax on the collateral inheritance and was rightfully held to apply only in-

sofar as it imposed a tax on property within this State. The same applies with respect to the direct inheritance tax acts and also the mercantile license tax acts.

All of these cases referred to by the court were cases where, in the first instance, the legislature attempted to usurp a power which was not inherent in the legislature, and the decision of the courts in all of these cases were predicated upon the principle that the legislature of Pennsylvania had no jurisdiction in the first instance to levy a tax on property without the confines of the State or on property engaged in intrastate commerce and of course it could not be presumed that the legislature intended to impose taxes on such property.

In the instant case, we are not confronted by a lack of jurisdiction or power on the part of the legislature when it enacted the act of 1907, but on the contrary, we have a proper exercise of the legislative powers.

In the case of MILLER *v.* UNION BANK AND TRUST COMPANY, 59 Pac. (2d) 1024 (1936), the Supreme Court of California held:

> * * * when discrimination or unconstitutionality results from a statutory amendment, as is the case here, it is the amendment which is invalid and not the original portions of the statute. Frost *v.* Corporation Commission, 278 U. S. 515, 525, 526, 49 S. Ct. 235, 73 L. Ed. 483. * * *

In the case of FIDELITY AND GUARANTY FIRE CORPORATION *v.* THE STATE TAX COMMISSION OF MARYLAND, 193 Atl. 164, the Court of Appeals of Maryland

had before it the same question involved in the instant case.

Section 15, Article 81 of the Code, Act of 1929, provided for the imposition of a tax on shares of national banks and domestic corporations other than finance corporations in the State of Maryland. The act further provided that after the ascertainment of the value of the shares of stock said corporations could deduct therefrom (1) the assessed value of all real estate assessed to such corporations; (2) if such corporation is a fire insurance company or life insurance company, the value of any mortgages on any real estate in this state held by it; (3) the value of shares of stock in any national bank and (4) the fair value of property exempt under section 7 (28 of this article). In accordance with the above act, the Tax Commission of Maryland, after ascertaining the total value of the company's stock deducted the assessed value of the insurance company's Maryland real estate, the net assessed value of shares of stock in domestic corporations which are taxable to the holders thereof under the laws of the State of Maryland, shares of stock in national banks situated in the State of Maryland, and certain issues of Baltimore City debt called city stock. There was included in the assets of the company, United States securities which were not deducted from the taxable value of shares. The company contended, in view of the case of SCHUYLKILL TRUST COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA, supra, that the failure to deduct by the State Tax Commission from the assessment, the United States securities, resulted in a discrimination against such United

States securities. The tax commission contended that to remove the discrimination, if such existed, it should be removed by striking down the deductions which created the discrimination. The Court of Appeals of Maryland, after pointing out the similarity of the Pennsylvania and Maryland statute held:

> The effect, therefore, of this opinion is that, this assessment is invalid only in so far as it excluded the valuation of the stock of domestic corporations, the stock of which had been assessed to their shareholders, the city stock and the stock of a steamship company. If these had been included in the valuation of the stock of the appellant, the assessment complained of could not have been regarded as an unfriendly discrimination against the federal securities which had been assessed in this case, as we read the majority opinion in the case of Schuylkill Trust Co. *v.* Pennsylvania, 296 U. S. 113, 80 L. ed. 91 * * *

It is true that the Maryland statute contained a saving clause providing for the elimination of any exemptions in the event that they were declared invalid. This, however, for the reasons hereinbefore cited does not distinguish this case from the instant case. The Commonwealth contends that since the amendatory acts of 1923, 1927 and 1929 are invalid and inoperative, they can have no effect on the prior valid act of 1907.

The court, in the above case, adopted the proper method to remove the discrimination by eliminating the exemptions rather than by increasing them. The latter would be judicial legislation, pure and simple.

IV

The shares of stock owned by nonresidents are subject to tax on shares provided by the act of 1907.

This question was originally raised in the case of SCHUYLKILL TRUST COMPANY, Appellant, *v.* COMMONWEALTH OF PENNSYLVANIA, 296 U. S. 113, and is renewed now by the appellant in the instant case. Because this matter was not directly passed upon by this court, the Commonwealth, in this brief, because of the importance of this question, renews its objections to the position of the appellant.

Although this objection was thus raised, it rather appeared in the court below to have been raised as a point of little consequence in view of the fact that only one sentence in the appellant's elaborate brief of argument in the court below made any reference thereto. Likewise, very little was said by the appellant at the oral argument on this point. In addition, to have this point so strenuously pressed now, in view of the fact that for all these years from 1907, no question of this character was raised by any of the learned counsel who represented the taxables involved, seems very unusual. At least, it leads to the conclusion that the contention now made that the language of the act of 1907 "clearly" did not apply to all of the shares of stock of trust companies both resident and nonresident owners, is without foundation, to characterize it mildly. Irrespective as to what the appellant may now contend on this point as to the act here in question, the fact remains that the taxing officers of

the Commonwealth—first the Auditor General and State Treasurer, and since The Fiscal Code, the Department of Revenue and the Department of the Auditor General, definitely interpreted the act of 1907, and its amendments as they have been made, as imposing a tax on all of the shares of the trust company in the hands of the shareholders whether they be resident or nonresident, and this interpretation was universally accepted up to the tax period here in question. For 23 years therefore, this interpretation has stood unchallenged. What has transpired to raise the question now? Did the decisions of the United States Supreme Court in FARMERS LOAN & TRUST CO *v.* MINNESOTA, 280 U. S. 204 (1929), and the other inheritance tax decisions which followed including FIRST NATIONAL BANK OF BOSTON *v.* MAINE, 284 U. S. 312 (1932) have anything to do with directing attention to the Pennsylvania trust company tax on shares? We doubt it because the imposition of transfer inheritance tax is fundamentally different than the imposition of a tax on shares of a bank or trust company in the hands of the shareholder. The Supreme Court said concerning this situation in FIRST NATIONAL BANK OF BOSTON *v.* MAINE, supra, (p. 329):

> * * * since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax. * * *

The Supreme Court of Pennsylvania in its original opinion (R. 73) in deciding this question said:

> Lastly, appellant argues that even though the tax in question in this proceeding be a tax on shares rather than a tax on the assets of the trust company, there is no jurisdiction in the Commonwealth of Pennsylvania to levy a tax on 166 shares owned by nonresidents. The authorities relied upon by counsel for appellant do not sustain this proposition. Commonwealth *v.* Standard Oil Company, 101 Pa. 119 was a capital stock tax case and does not impinge upon our decision here. Dupuy *v.* Johns, 261 Pa. 40 relates to personal property tax levied under the Act of June 17, 1913, P. L. 507, and is likewise not in point. Nor is the tax here in question within the prohibition against double taxation enunciated by the decisions of the United States Supreme Court in Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204, and First National Bank of Boston *v.* Maine, 284 U. S. 312, for those cases concern the imposition of transfer inheritance taxes upon choses in action at the death of the owner and can have no application here. [fol. 126] The principle that shares of stock of a corporation may be taxed by the state of incorporation whether in the hands of resident or nonresident owners is clearly upheld in Corry *v.* Baltimore, 196 U. S. 466, where it is said, pages 476, 477: "* * * the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein and * * * a regulation establishing the situs of stock for the purpose of taxation, and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation." We are of opinion the Act of 1907, P. L. 640, as amended by the Act of April 25, 1929, P. L. 673 establishes

the situs of the shares of appellant in Pennsylvania for the purpose of taxation within the meaning of the act.

In addition, there has been no amendment of the act of 1907, since its passage, which had to do with any change in the reporting of the shares or the assessment of the tax thereon, so far as this particular question is concerned, either directly or indirectly. It would appear that this present attack is only another example of the people becoming more tax conscious during a period of depression and using the proverbial magnifying glass to find flaws in the taxing statutes.

In view of the contention here made, the first question arises as to whether the legislature in the act of 1907, as amended, actually intended to tax all of the shares of stock of trust companies in the hands of the shareholders. As previously stated, the act has been interpreted by the taxing officers of Pennsylvania, ever since its enactment, to tax all shares owned by both residents and nonresidents. However, let us carefully examine the act itself with this point in mind.

The act of 1907, requires every title insurance or trust company incorporated in Pennsylvania under the provisions of the acts therein referred to, to report on or before a certain date to the Department of Revenue setting forth "**the full number of shares of the capital stock** subscribed for or issued by such company, etc." And thereupon it is provided that the Department of Revenue shall assess "**such shares** for taxation at the rate of five (5) mills upon each dollar

of the actual value of **each share of stock"** to be ascertained as therein provided. Near the end of section 1 it will be noted that it is provided: "That **upon the payment of the tax** fixed by this act into the State Treasury, through the Department of Revenue, the **shares** and so much of the capital, surplus, profits, and deposits of such company as shall not be invested in real estate **shall be exempt from all other taxation under the laws of this Commonwealth."** Thus it will be noted that the act of 1907, clearly and definitely imposes a tax on **all** of the shares of the stock of trust companies in the hands of the stockholders, whether they are resident or nonresident.

The act of 1907, as amended, also clearly and definitely provides for notice of the assessment of the tax on shares as settled by the taxing officers by requiring the same to be posted in a conspicuous place in the company's place of business. If the president, cashier, or treasurer of such company refuse to post the notice as required, such officer shall be adjudged to be in default and as a penalty therefor the company is made liable for the tax assessed against the stockholders.

The act further provides that it shall be the duty of the Auditor General (now the Secretary of Revenue) to hear any stockholder upon the subject of the valuation of any shares of stock at his office, within a period of thirty (30) days from the date of such settlement.

In view of the above provisions can it be seriously contended that the legislature of Pennsylvania did

not clearly and definitely intend to tax in Pennsylvania, the situs of the trust company where the investment was made, all of the shares of stock of the shareholders whether they be resident or nonresident? In addition to the clear statement all through section one of the act of 1907 that **all** of the shares are to be taxed, we wish to call particular attention to the proviso, previously referred to, near the end of section 1, which provides that upon the payment of the tax fixed by the act "the shares and so much of the capital, surplus, profits and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth" —meaning local taxation. What could be clearer than this to show that the Commonwealth was taxing **all of the shares?** If this were not so and only resident shares were taxed, there would be a proportionate liability for local taxation on that part of capital, surplus, profits and deposits represented by nonresident shares.

However, it is contended by appellant that this is contrary to the principle laid down by this court in COMMONWEALTH *v.* STANDARD OIL CO., 101 Pa. 119 (1882) "that the shares of stock in a Pennsylvania corporation, held by a corporation or individual domiciled in another state cannot be taxed here," and that this principle has not since been changed in Pennsylvania. But it is important to note that the court was there dealing with a capital stock tax case and not a tax on shares. When it came to enact the law providing for a tax on shares of a trust company in 1907, the legislature had before it a very different problem.

It was important for many reasons that all the shares be taxed and it so provided. As stated by Mr. Justice Elkin in COMMONWEALTH *v.* MORTGAGE TRUST Co., 227 Pa. 163 (1910) at page 180:

> * * * The legislature, in 1907, **made a new class of taxable subjects** and provided in express terms a definite method of determining the actual value of the shares of stock belonging to this taxable class. * * * (Boldface ours)

In view of this intent on the part of the legislature in the act of 1907 to tax **all of the shares** of stock in the hands of the shareholders, the question then arises, did the legislature have the power to impose such a tax applicable to nonresidents as well as residents? We submit that, as determined by the court below, this power is clearly established by the decision of the United States Supreme Court in CORRY *v.* CITY OF BALTIMORE, 196 U. S. 466 (1904).

However, it is contended by the appellant that the distinction in CORRY *v.* BALTIMORE is that the situs was created in the charter. The United States Supreme Court did not so state. True, it is that the statute which created the corporation fixed the situs of its stock for the purpose of taxation at the office of the corporation in Maryland. Although our Pennsylvania act does not definitely state in so many words that the situs for taxation of the shares shall be in Pennsylvania, it does definitely provide, as previously indicated, that **all of the shares of stock** of domestic title insurance and trust companies, **issued and outstanding,** shall be liable for this tax. The act could not be more specific in this respect. However, the decision

in the CORRY *v.* BALTIMORE case does not appear to have rested on the fact that the statute itself declared the situs for taxation of such stock, but more upon the notice to the nonresident stockholder of the assessment of the tax and the opportunity for contest by him as to the correctness of the valuation or validity of the tax itself. So far as these points are concerned, we submit that the act of 1907, together with the provisions of The Fiscal Code, provide more definitely for notice of the assessment and the right of hearing by the stockholders than does the Maryland act in the CORRY *v.* BALTIMORE case. In addition to the right of hearing afforded to the stockholder, the act of 1907 and its amendments also definitely provide for the hearing of the corporation as the agent of the stockholders on all questions pertaining to the assessment of the tax. The Supreme Court of the United States said in CORRY *v.* BALTIMORE, supra, at page 474:

> That it was rightly determined that it was within the power of the state to fix, for the purpose of taxation, the situs of stock in a domestic corporation, whether held by residents or nonresidents, is so conclusively settled by the prior adjudications of this court that the subject is not open for discussion. Indeed, it was conceded in the argument at bar that no question was made on this subject. * * *

In addition to CORRY *v.* BALTIMORE, supra, in further support of the power of the state to impose a tax on shares of trust companies in the hands of nonresident as well as resident shareholders, we cite the following decided cases: ABINGTON BANK *v.* WASHINGTON CO., 88 Va. 293; 13 S. E. 407 (1891); DANVILLE BANKING

COMPANY *v.* PARKS, 88 Ill. 170 (1878); SCANDINAVIAN-AMERICAN BANK *v.* PIERCE CO., 20 Wash. 155, 55 Pac. 40 (1898); STATE *v.* TRAVELERS INSURANCE CO., 70 Conn. 590, 40 Atl. 465 (1898); ST. ALBANS *v.* NATIONAL CAR CO., 57 Vt. 68 (1884); KOOCHICHING CO. *v.* MITCHELL, 173 N. W. (Iowa) 151 (1919).

In STATE *v.* TRAVELERS INS. CO., supra, a Connecticut statute, provided for a tax on shares and required the cashier of certain corporations to deliver to the controller a sworn list of all shareholders residing outside the state on a designated date and imposed the tax on such nonresidents, to be collected by the cashier of such corporations. It was contended that the statute attempted to tax property beyond the jurisdiction of the state. The court overruled this contention and said at page 603:

> There is nothing in the objection urged in the demurrer to the complaint, that the law in question "attempts to impose a tax upon personal property outside the jurisdiction and beyond the territory of the State." Each nonresident shareholder participates in the enjoyment of a franchise granted by this State, and has an equitable interest in property which is protected by this State, and whose legal owner (the defendant) is one of its own citizens. The sovereign power which gave his shares a being could also give them a situs within its territory for purposes of taxation. Tappan *v.* Merchants' National Bank, 19 Wall. 490; Lockwood *v.* Weston, 61 Conn. 211, 218. To do this it is not necessary to declare in terms that they shall be deemed to be situated where the corporation belongs. It is enough to lay a tax upon them there, and impose a lien upon them there.

In ST. ALBANS *v.* NATIONAL CAR CO., supra, a Vermont statute provided for a tax on shares against certain corporations and that shares of stock in these corporations owned by residents of the state should be listed at the place of residence and those shares owned by nonresidents should be listed at the town where the corporation has its principal place of business, which corporation is the collector of the tax. This tax was upheld by the Vermont courts. The facts revealed that the car company was incorporated in 1868, and that the charter was granted subject to future legislation. The tax was passed in 1880. The court said, at page 81:

> * * * Admitting the general doctrine that in the absence of all provisions to the contrary, the stockholders in a corporation can be taxed upon their stock at the place where they reside, we think it is equally true that the nature of stock is such that it may be taxed elsewhere. If shares of stock represent nothing but that which is intangible, it could with better reason be claimed that it must always follow the domicile of the owner, and could not be taxed elsewhere; but it represents the property of the corporation, that in which the capital stock is invested. * * * Judge Cooley, in his valuable work on taxation, p. 274, in stating the general rule, that "the individual corporators, if taxed on their shares of stock, are to be taxed where they respectively reside," adds this important qualification, "though they may be and sometimes are, taxed at the place where the corporate business is carried on."
>
> But we think there is a still stronger reason why the taxation in question was valid. The corporate home of the company is in this State; the corporation is expressly subject to the exclusive

> legislative authority of the State; * * * its dwelling is here, although it may do business elsewhere; and its members, when they enter into the relation of stockholders, do so subject to such changes in the law relating to the corporation as the supreme legislative authority deems it proper to make. * * *

And with respect to the fact that the tax came after the charter it said:

> * * * It was conceded in argument that if the statute relating to the taxation of the shares had been inserted in the charter, that taxation under it would be legal. The charter would have been taken by the stockholders subject to such provision. But the stockholders took the charter subject to the right of the legislature to modify or repeal its provisions. Such modification may be made by general law, applicable to all similar corporations as well as by special amendments to each charter. Taking the charter subject to the power of future legislation, the stockholders took it subject to the law in contention as absolutely as if it had been included in the charter originally. The corporation also received its existence subject to modification by future legislation, though under the form of a general law. We see no valid reason why we should hold, without such a provision in the charter originally, that upon the acceptance of it, the stockholders or corporation should be exempt from the duties relating to taxation which are intended to apply to all alike. The taxation, therefore, in the manner shown, was legal.

So in the instant case, the appellant received its charter subject to the right of the Pennsylvania legislature to alter, amend, revoke or annul the same

(Pennsylvania Constitution, Article XVI, sec. 10); and it follows that if it is contended that the act of 1907 (and its amendments) is inconsistent in any way with the charter granted to appellant under the act of 1874, the act of 1907 must control and the corporation and its shareholders be bound by its provisions.

In addition to the above, from the standpoint of "business situs," which was referred to by the United States Supreme Court in FARMERS LOAN AND TRUST COMPANY *v.* MINNESOTA, supra, the situs for taxation of bank shares should be at the domicile of the bank for just as much reason as the situs of national bank shares for taxation is the situs of the bank as declared by Act of Congress because as said by the Supreme Court of the United States in TAPPAN *v.* MERCHANTS NATIONAL BANK, 19 Wall. 490 (1874) at page 503:

> A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts its business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems rea-

> sonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so. If it is not, the General Assembly can rightfully locate his shares there for the purpose of taxation.

And again at page 499:

> * * * Every owner takes the property subject, to this power of taxation under state authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the State in which he resides and submitted to the taxing power of the State where, in contemplation of the law, his investment is located. * * *

V

The discrimination features of the act of 1907 as amended have been removed.

The remaining portion of this brief is devoted to the argument that if the Commonwealth's original position to the effect that the Schuylkill Trust Company is liable to taxation in accordance with the act of 1907 without any deductions, cannot be sustained by this court, then the position of the appellant is unsound because the discrimination complained of has been removed by the decision of the Supreme Court of Pennsylvania in this case.

In the case of United States securities it has always been held that the securities themselves cannot be

taxed as property in the hands of the owner. Accordingly, when such securities are owned by a corporation, a capital stock tax, or other tax upon the property of the corporation, must exclude their entire value. But, it has held, just as consistently, that when a state imposes a tax upon the shares of stock of a corporation, as the property of the shareholders, there need be no deduction whatever made in the value of such shares by reason of the fact that the corporation itself owned securities of the United States and such ownership added value to the shares in the hands of the shareholders.

VAN ALLEN *v.* THE ASSESSORS, 3 Wall. 573,
CLEVELAND TRUST CO. *v.* LAUDER, 184 U. S. 111,
DES MOINES BANK *v.* FAIRWEATHER, 263 U. S. 103,
EDUCATIONAL FILMS *v.* WARD, 282 U. S. 379.

Since the tax here involved is a tax upon the interest of the shareholder in the trust company, the rule of the foregoing cases clearly applies, and, under it, there would be no necessity to make any deduction whatever by reason of the company's ownership of United States securities if it were not for the discrimination arising from the deduction allowed for shares of stock of other corporations.

We think it is clear that the ruling of the Supreme Court of the United States respecting this class of securities was not based upon the nature or the incidence of the tax, but solely upon the fact that there was an unfriendly discrimination against such securities and in favor of others. And from this it follows that if United States securities are placed upon an

exact parity with shares of stock of other corporations taxed or relieved of tax, the discrimination is removed and the tax so settled is valid. This is what the court below has done, and we believe that it was clearly right. There is no reason to place United States securities in a more favorable position than the shares of stock of other corporations.

This court, in the case of SCHUYLKILL TRUST COMPANY, Appellant, *v.* COMMONWEALTH OF PENNSYLVANIA, 296 U. S. 113, in its opinion (R. 81) said:

> * * * If the burden of the tax be lifted in respect of some securities (as it is by confession from those issued by certain Pennsylvania corporations) it must necessarily fall on the remaining securities owned by the company. If the tax is lifted from the shares of certain trust companies because those companies own only stocks already taxed or relieved from taxation by the State, and shares in other trust companies are taxed amongst whose assets there are United States bonds or other securities entitled to exemption because issued by federal instrumentalities which are figured in the base of the tax, it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely by reason of ownership of such federal securities.

From this I believe we can safely assume that if a like burden of tax is lifted from United States securities as is lifted in respect of some securities, there can be no discrimination against United States securities since they are treated alike and to the same extent. Appellant complains that the use of the formula enunciated by the lower court does not remove the

discrimination on the theory that only a percentage of the total value of the United States securities are deducted. Certainly, the appellant should realize that the same percentage is deducted for Pennsylvania securities. The evident intent of the lower court was to treat the United States securities on a par with those securities of Pennsylvania corporations, the allowance of which as a deduction was held to discriminate against the United States securities. Certainly the percentage of all deductions will increase or decrease in taxing different banks depending upon the amount of United States securities or Pennsylvania shares that it might own, but the principle in all these cases remains the same, and that is that a deduction for United States securities will be allowed in the same proportion that a deduction is allowed for Pennsylvania securities. Appellant complains that flat deductions may be allowed to other banks where they prove the purchase of such securities to be out of capital stock, surplus and undivided profits. It is suffice to say in this connection that the same allowance is available to the appellant upon proof of such purchase.

The courts certainly hesitate to strike down a whole act as contended for by the appellant merely because there was an attempt to reach what was constitutionally exempted where the statute was capable of a constitutional interpretation.

As stated in ENDLICH on INTERPRETATION of STATUTES, Sec. 179:

> "It is a safe and wholesome rule to adopt the restricted construction of a statute, when a more

> liberal one will bring us in conflict with the fundamental law," indeed to regard as excepted by necessary implication from even the most express and absolute general provisions, all cases to which a statute cannot constitutionally apply.

When the language of a statute is so broad that its strict application will impose a tax upon property or value which cannot constitutionally be taxed, how is a violation of the constitution to be avoided. Shall it be done by declaring the entire statute invalid thereby defeating the express will of the legislature or shall it be by reading into the statute, an implied exclusion or deduction of such property or value in order that the statute may be sustained as so construed and applied?

If the Commonwealth's position that the act of 1907 applies in the instant case is untenable, then we submit that the latter answer is the correct one. We believe it the duty of the courts to sustain the acts unless it is clearly unconstitutional, and it is their further duty to construe it in such manner as to sustain its validity, if such construction can reasonably be found. In this connection, may we point out that in the Schuylkill Trust Company case originally before this court, the appellant did not attack the constitutionality of the statute itself, but contended that the statute as construed and applied was discriminatory. We respectfully refer to the minority opinion of Mr. Justice Cardozo in this case where he said "If the State maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, even at the price of enlarging the deductions.

Iowa-Des Moines Bank *v.* Bennett, 284 U. S. 239, 247."

The lower court pursued this method and by so doing, sought to carry out what, in its opinion, was the intention of the legislature.

It is presumed that the legislature did not intend to violate the constitution and it therefore may be further presumed that it did not intend to include in the measure of the taxable value of the shares, the value of the United States securities which would thereby be discriminated against, but it maintained that its act should be so construed as to eliminate the value of such securities to the same extent that it allowed other securities to be eliminated in arriving at the value of the shares of trust companies.

The history of Pennsylvania is replete with cases wherein the legislature in the first instance imposed a tax on property owned by residents of Pennsylvania. These taxes were imposed on all the property of such residents, regardless where situated, and it was only through judicial construction that the intention of the legislature was deemed to impose a tax on such property only within the confines of this Commonwealth, for to do otherwise would be unconstitutional.

We shall attempt here to set out several of the instances wherein this principle of judicial construction was applied rather than a declaration of the courts that the act of the legislature was unconstitutional.

In the case of the STATE FREIGHT TAX, 15 Wall. 232 (1872), the Supreme Court of the United States held

that a tax levied by the State of Pennsylvania upon each ton of freight carried from the State to other states or foreign countries, and upon each ton brought into the State from outside was unconstitutional because it laid a burden upon interstate commerce and amounted to a regulation of such commerce. This court did not strike down the entire act as unconstitutional, but on the contrary, expressly stated that the tax was valid insofar as it applied to commerce within the State. The effect of the decision was to read into the act, an implied provision relieving the freight moving into interstate and foreign commerce.

In the case of PHILADELPHIA AND SOUTHERN STEAMSHIP Co. *v.* PENNSYLVANIA, 122 U. S. 326, this court held that a tax upon the gross receipts derived from passengers or property transported in interstate commerce was unconstitutional and in referring to the case of the State Freight Tax just cited, this court, at pages 339-340 said:

> The court in its opinion took notice of the fact that the law was general in its terms, making no distinction between freight transported wholly within the state and that which was destined to, or came from, another state. But it was held that this made no difference. The law might be valid as to one class, and unconstitutional as to the other.

The act here was not stricken down, but was construed and applied by the taxing officers so as not to impose a tax on gross receipts derived from interstate commerce.

The direct inheritance tax act of June 20, 1919, P. L. 521 of this Commonwealth provided for a tax on the transfer of property of a resident of Pennsylvania, whether the property was situated within this Commonwealth or elsewhere.

In the case of FRICK *v.* PENNSYLVANIA, 268 U. S. 473, (1925), it was decided that upon the death of an individual resident of Pennsylvania, the tangible personal property of which he died seized located without the state, was not subject to the inheritance tax. The fact that the act is unconstitutional insofar as it applies to such property, or when it is administered, so as to impose a tax on such property, did not invalidate the remainder of the act, and inheritance taxes continued to be collected under it, there being after the decision in the Frick *v.* Pennsylvania case, supra, an implied provision that tangible personal property without the Commonwealth cannot be the subject of the tax.

In the case of CREW LEVICK COMPANY *v.* PENNSYLVANIA, 245 U. S. 292 (1917), it was decided that a mercantile license tax imposed on all retail dealers based upon each dollar of the whole volume gross of business transacted annually was unconstitutional insofar as such tax included sales made in interstate commerce. The result was not to strike down the entire mercantile tax law, but merely to exclude from the assessment so much of the sales as could not be taxed. And mercantile taxes have been collected under this statute ever since. The language of the act has not been changed. No express exclusion of sales in interstate commerce has been provided for. The taxing officers have merely read into the act, an implied exclu-

sion of such sales and have imposed tax on the remainder.

The lower court has adopted the same policy in the instant case and in its opinion (R. 119) says:

> We find no case in which the courts have struck down the statute in toto, merely because there was an attempt to reach what was constitutionally exempted where the statute was capable of a constitutional interpretation.
>
> Certainly the Legislatures of Pennsylvania, during the large part of a century had this principle in mind in passing these statutes with all-inclusive language, not intending that they should be enforced to violate the Constitution, but intending, as the courts had led the legislature to believe, that they could be constitutionally construed to include everything which the language could constitutionally embrace.

Therefore, if to allow any deduction for Pennsylvania shares results in a discrimination against United States securities, then a like deduction of such United States securities removes the discrimination. This having been done by the lower court and discrimination being the basis of claim by the appellant, the situation in our opinion has been rectified in regard to appellant's claim by this decision.

CONCLUSION

(a) The Commonwealth submits that the tax imposed by the Act of June 13, 1907, P. L. 640, is a valid tax on shares and remains unaffected by the amendments which were declared discriminatory;

(b) That the Schuylkill Trust Company is subject to tax for the year 1930 in accordance with the provisions of the act of 1907 allowing no deductions whatsoever from the capital stock, surplus and undivided profits in arriving at the value of the shares;

(c) That the tax imposed by this statute on the nonresident shareholders is a proper one.

(d) The discrimination complained of has been removed by treating United States securities on a parity with Pennsylvania shares.

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APPENDIX

Act approved June 13, 1907, P. L. 640:

Section 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, and its supplements; for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances, and every company entitled to benefits of, and every company having any of the powers of, companies entitled to the benefits of an act, entitled "An act conferring upon certain fidelity, insurance, safety deposit, trust, and savings companies the powers and privileges of companies incorporated under the provisions of section twenty-nine of an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth Anno Domini one thousand eight hundred and seventy-four and of the supplements thereto," approved June twenty-seventh, one thousand eight hundred and ninety-five, commonly known as title insurance, or trust, companies, shall, on or before the twentieth day of June in each and every year, make to the Auditor General a report in writing, verified by the oath or affirmation of the president, secretary, or treasurer, setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of

five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. The Auditor General shall have the power, and it shall be his duty, in case he shall not be satisfied with the correctness of the report as made by the officers of any such company, to summon the officers of said company to appear before him, upon notice to do so, on a day to be fixed by him, and to bring with them the books of said company for his examination; and he shall have the right to have further evidence to satisfy himself of the correctness of the report made to him on the question of the value of the shares of stock of such company, according to the rule hereinbefore stated. After the Auditor General shall have fixed the value of the shares of stock in any such company by the method hereinbefore provided, and settled an account according to law, he shall thereupon transmit to the president, cashier, or treasurer of such company a copy of such settlement, showing the valuation and assessment so made by him and the amount of tax due the Commonwealth on all such shares. And it shall be the duty of the president, secretary, or treasurer of any such company, immediately upon the receipt of said settlement, to post the same in a conspicuous place in such company's place of business, so as to give notice to the shareholders of such valuation; and it shall be the duty of the Auditor General to hear any shareholder upon the subject of the valuation of such shares of stock, at the Auditor General's office, within a period of thirty days from the date of said settlement. It shall be the duty of every such company, within a period of forty days after the date of such settlement by the Auditor General, at its option to pay the amount

of said tax to the State Treasurer from its general fund, or collect the same from its shareholders and pay over to the State Treasurer: Provided, That if any such company shall fail or refuse to make such report, or to pay such tax, at the time hereinbefore specified, or shall make any false statement in such report, or shall fail or refuse by its officers to appear before the Auditor General upon notice, as aforesaid, or shall fail or refuse to produce its books for examination when required to do so by the Auditor General, he shall, after having ascertained the actual value of each share of the capital stock of such company from the best information he can obtain, add thereto fifty per centum as a penalty, assess the tax as aforesaid, and proceed according to law to collect the same from such company: Provided further, That if the president, cashier, or treasurer of any such company shall neglect or refuse to post a copy of the settlement, in a conspicuous place in such company's place of business, immediately upon the receipt of the same, so as to give notice to the shareholders, such president, cashier, or treasurer shall be adjudged to be in default, and, as a penalty for such default, such company shall be responsible to the Commonwealth for the amount of the tax assessed against the shareholders of such company: And provided further, That in case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company,

and pay said tax into the State Treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company, as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth.

Act approved July 11, 1923, P. L. 1071, at page 1072.

The important part bearing on this case is as follows:

* * * and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together **so much** of the amount of capital stock paid in, the surplus, and undivided profits as **is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares,** and dividing this amount by the number of shares. * * *

Act approved May 7, 1927, P. L. 853.

This act further amended the act of 1907 which was last amended by the act of 1923 (page 855):

* * * and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital

stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares. * * *

Act approved April 25, 1929, P. L. 673; amended by Act approved June 13, 1907, P. L. 640; last amended by Act approved May 7, 1927, P. L. 853:

Section. 1. Be it enacted, &c., That from and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled * * *; and thereupon it shall be the duty of the Department of Revenue to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together so much of the amount of capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax, or relieved from the payment of capital stock tax or tax on shares, and dividing this amount by the number of shares * * *: Provided * * * That upon the payment of the tax fixed by this act into the State Treasury, through the Department of Revenue, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate shall be exempt from all other taxation under the laws of this Commonwealth.

Section 807 of The Fiscal Code, approved April 9, 1929, P. L. 343:

Section 807. Special Procedure in Connection with Valuations of the Stock of Banks, Savings Institutions, Title Insurance and Trust Companies.—After the Department of Revenue shall

have fixed the value of the shares of stock in any bank, savings institution, title insurance company or trust company, and a settlement shall have been made as hereinbefore provided, the Department of Revenue shall transmit to the president, cashier, or treasurer of such bank, savings institution, title insurance company, or trust company, a copy of such settlement, showing the valuation and assessment so made by it and the amount of tax due the Commonwealth on all such shares. And it shall be the duty of the president, cashier, or treasurer, of any such bank, savings institution, title insurance company, or trust company, immediately upon the receipt of said settlement, to post the same in a conspicuous place in such bank, savings institution, title insurance company, or trust company so as to give notice to the shareholders of such valuation; and it shall be the duty of the Department of Revenue to hear any shareholder upon the subject of the valuation of such shares of stock, at the department's office within a period of thirty days from the date of said settlement. If any such hearing be held, notice thereof shall be given to the Department of the Auditor General, and that department shall be represented at such hearing.

It shall be the duty of every bank, savings institution, title insurance company, or trust company, within a period of sixty days after the date of such settlement by the Department of Revenue, at its option, to pay the amount of said tax from its general fund, or collect the same from its shareholders, and pay the same over to the State Treasurer through the Department of Revenue.

Section 1705 of the Fiscal Code approved April 9, 1929, P. L. 343.

Section 1705. Failure of Bank, Saving Institution, Title Insurance Company, or Trust Com-

pany to Make Report, Pay Tax, or Post Notice of Settlement.—If any bank, or savings institution, having capital stock, incorporated by or under any law of this Commonwealth, or under any law of the United States, and located within this Commonwealth, or any title insurance company or trust company, as defined in section 712 of this act, shall fail or refuse to make the report required by section seven hundred eleven or section seven hundred twelve of this act, at the times therein specified, or shall make any false statement in such report, or shall fail or refuse, by its officers, to appear before the Department of Revenue, or shall fail or refuse to produce its books for examination when required to do so by the Department of Revenue, the department shall, after having ascertained the actual value of each share of the capital stock of such company from the best information it can obtain, add thereto ten per centum as a penalty, assess the tax, and proceed according to law to collect the same from such company; and, if the president, secretary, or treasurer of any such company shall neglect or refuse to post a copy of the settlement in a conspicuous place in such company's place of business, immediately upon the receipt of the same, so as to give notice to the shareholders, such president, secretary, or treasurer, shall be adjudged to be in default, and, as a penalty for such default, such company shall be responsible to the Commonwealth for the amount of the tax assessed against the shareholders of such company.

Article XVI, Section 10 of the Pennsylvania Constitution provides as follows:

> The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption

of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation.